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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

No. 953

KEARNS COAL CORPORATION,

Petitioner,

against

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Counsel for Respondent.

New York, May 1st, 1941.

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No. 953

KEARNS COAL CORPORATION,

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against

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This brief is filed by respondent in opposition to a petition by the plaintiff, Kearns Coal Corporation, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Petitioner seeks a review in this Court of a judgment of said Circuit Court of Appeals entered in the above entitled action on April 3, 1941, which reversed a judgment of the District Court of the United States for the Southern District of New York, in favor of the plaintiff in the sum of $18,300.50 and directed a dismissal of the complaint.

The opinion of the District Court is printed at page 437 of the record. The unanimous opinion of the Circuit Court of Appeals for the Second Circuit, written by CLARK, Circuit Judge, in which Circuit Judges SWAN and CHASE concurred is printed at pages 444-452 of the record and is reported in 118 F. (2d) 33.

Questions Presented

1. Was the plaintiff-petitioner an "additional assured" within the terms of the policy of the United States Fidelity & Guaranty Company, without relying on an estoppel to fall within such definition?

2. As a matter of law under the New York decisions, must prejudice to an assured be established before an estoppel may arise against an insurance company which withdraws from the defense of an assured at a time and under the circumstances where the insured is left with an adequate opportunity to defend the action?

3. Under all of the circumstances in this case, has the Kearns Coal Corporation presented facts sufficient to entitle it to make any claim of estoppel?

No question of constitutional or statutory construction is involved. No conflict between the different Circuits of the United States Courts is presented.

Statement of Facts

The United States Fidelity and Guaranty Company, a liability insurance company, on the 30th day of August, 1933, delivered to the Newton Contracting Company, Inc., its policy of insurance No. A-822487, wherein said Newton

Contracting Company, Inc., and/or Hastings Pavement Co., were named as assured (ff. 11, 35-37, Ex. 1, R. 326).

While this policy was in force, a certain Mack truck described therein, after making deliveries of coal to plaintiff's customers and while being driven back to the garage on the 31st day of December, 1933, collided with a sled on which one William Pasley, eleven years old, was riding, causing him serious injuries. Thereafter, on the 5th day of January, 1934, William Pasley, by Anna Pasley, his guardian *ad litem*, and Anna Pasley, individually, commenced an action against the Kearns Coal Corporation, the Newton Contracting Company and others.

The Kearns Coal Corporation, in turn, had its own policy of automobile liability insurance with the Travelers Insurance Company, in which it was a named assured. That policy had a "Hired Automobiles Endorsement" thereon for which the plaintiff paid $1,500 as an estimated advance insurance premium covering automobiles hired by the Kearns Coal Corporation. This policy was taken out on June 27th, 1933 (Ex. I, R. 413).

The defendant denied any liability to the plaintiff because of provisions, conditions and exclusions contained in the insurance policy issued by the defendant to its assured, Newton Contracting Company, all of which are referred to at length in the following points. Primarily, defendant contended that plaintiff did not come within the definition of an "additional assured" as defined in defendant's policy. Defendant's answer also set up the fact that at the time of the accident to the Pasley boy, the described automobile was rented to the plaintiff by the Newton Contracting Company, and the defendant's policy excluded any liability "while any disclosed automobile is rented to others."

When this accident occurred, the Kearns Coal Corporation at once realized the obligations and liabilities of the Travelers Insurance Company to defend it and be responsible for any judgment which might be obtained in the *Pasley* action. On the very day that the accident to the Pasley boy occurred, the Kearns Coal Corporation by A. J. Pagano, office manager, wrote a letter reporting the accident to H. Waltemade, Inc., the insurance broker through whom Kearns Coal Corporation obtained the policy in the Travelers (Ex. O, R. 417). This letter of December 31, 1933, was promptly forwarded to the Travelers (Ex. S, R. 423).

Henry Waltemade wrote to the Travelers Insurance Company on January 2nd, 1934, referring to the Kearns Coal Corporation's insurance Policy No. FA-7482553 and asked the company to "give same your immediate attention and acknowledge receipt of this report."

The summons in the case of *Pasley* v. *Kearns Coal Corporation, et al.* was served January 5th, 1934 on the Kearns Coal Corporation. It was promptly sent by letter to and received by the Travelers Insurance Company (Ex. T, R. 424).

When Alexander Campbell, a Claim Department employee of the Travelers received a second letter from Henry Waltemade, dated January 8, he telephoned Mr. Pagano of the Kearns Coal Corporation "sometime after" and told him that in his opinion the Kearns Coal Corporation was entitled to protection under another policy of insurance (ff. 765-766).

On being pressed further as to what he said, Campbell answered:

> "Well, I told Mr. Pagano that there was other protection in addition to ours available to them * * * and I suggested to Mr. Pagano that it would be to their best interests to refer the summons to the owner of the automobile" (ff. 767-768).

When this employee, Campbell, made these statements to the manager of his company's assured, the Kearns Coal Corporation, he had never even seen the policy of the Newton Contracting Company, the owner of the automobile (f. 770). Evidently, upon the insistence of Campbell, the Pasley summons served on Kearns Coal Corporation was sent to the Newton Contracting Company, and, by it, forwarded to the United States Fidelity and Guaranty Company.

We have a letter, dated January 16, 1934, from the defendant to its agent, the County Agencies Inc. (Ex. 23, R. 377), and a letter from the County Agencies Inc., to the Kearns Coal Corporation returning the summons in the *Pasley* action (Ex. 24, R. 377). The letter written by this agent of the United States Fidelity and Guaranty Company which returned the summons to the Kearns Coal Corporation states as the reason for its return that no coverage was afforded to the plaintiff (Ex. 24, R. 377).

On January 23, 1934, Henry Waltemade, Inc., on behalf of the Kearns Coal Corporation for the second time forwarded the summons in the action of *Pasley* v. *Kearns Coal Corporation, et al.* to the Travelers Insurance Company with a letter, dated January 23, 1934. This letter asked the Travelers to give the matter their "immediate attention" but that company failed to appear (Ex. U, R. 425).

Once again, and finally for the third time, the summons in the action of *William Pasley, an infant, et al.* v.

Kearns Coal Corporation, et al. was forwarded to the Travelers Insurance Company by Henry Waltemade, Inc. (Ex. V, R. 426).

And again, the Travelers Insurance Company refused to appear for its named assured, and so refusing, forwarded the summons served on the Kearns Coal Corporation to this defendant. In their letter of February 6, 1934, the Travelers' manager wrote that "the plaintiff's attorney states that he will not grant any further extension of time for Kearns to appear after February 12, 1934" (Ex. 27, R. 382, f. 1147).

The danger of a default by the Kearns Coal Corporation in filing its notice of appearance and answer became imminent. The Travelers Insurance Company had refused three times to accept the summons sent to it by its insurance policy holder, the Kearns Coal Corporation. Mr. Campbell of the Travelers assured a representative of the Fidelity Company that the Travelers insurance policy did not cover the Kearns Coal Corporation in this particular case (ff. 765-766). No copy of this Travelers policy was forwarded to the company's representative (ff. 398-399, 413). Thereupon, under the pressure of a possible default being taken against the defendant, Kearns Coal Corporation, the Fidelity Company designated the attorneys, Jenkins, Dimmick and Finnegan, who appeared in the *Pasley* action and served an answer to the plaintiffs' complaint on its behalf (answer of defendant Kearns Coal Corporation verified February 21, 1934, Ex. 5, R. 334).

These attorneys took over the defense of the Kearns Coal Corporation and exercised all professional care and skill for a period of approximately eight months, from the filing of its answer on February 21, 1934, to October 24,

1934. It then returned the papers in the *Pasley* case to the Kearns Coal Corporation and disclaimed any liability to that corporation under its policy of insurance No. A 822487 which it had issued to the Newton Contracting Company. During this period of eight months and later, both insurance companies conducted investigations as to the occurrence of the accident (ff. 817-822). An examination before trial of the presidents of the Kearns Coal Corporation and Newton Contracting Company and the driver of the motor truck at the time of the accident was held pursuant to an order of a justice of the New York Supreme Court (ff. 1195-1196, 1217, Ex. E, R. 399, 406).

Ray L. Walker, superintendent of the Claim Department of the United States Fidelity and Guaranty Company, read the testimony taken before trial of Messrs. Kearns, Brown and Williams, and ordered a new investigation (f. 817). On the basis of a new statement made by A. J. Pagano, dated October 15, 1934 (Ex. K, R. 415-416), the testimony of the above witnesses, the reinvestigation of the case and upon the opinion of counsel for the Fidelity Company, Mr. Walker ordered this final disclaimer of liability (ff. 816-837, Ex. 9, R. 346-347).

The Travelers received the papers in the *Pasley* action which were returned to the Kearns Coal Corporation by the defendant and referred the defense in said action to E. C. Sherwood, attorney, at 100 East 42nd Street, New York, N. Y. At this time Mr. Sherwood was substituted as attorney for the Kearns Coal Corporation and took over its defense in the *Pasley* action. The Fidelity Company had designated the firm of Jenkins, Dimmick and Finnegan, attorneys, which appeared in the *Pasley* action on behalf of the co-defendants Newton Contracting Company and George

Williams. While the action was still pending, the Fidelity Company settled the Pasley claims as against these two defendants for the total sum of $15,000. This settlement was duly authorized by Honorable LLOYD CHURCH, Justice of the New York Supreme Court, on January 6th, 1937 (Ex. G, R. 409-411).

E. C. Sherwood, as attorney for the remaining defendant, Kearns Coal Corporation, then amended its answer by setting forth as a separate, distinct and partial defense in mitigation of damages that there had been paid on behalf of the defendants Newton Contracting Company and George Williams to the plaintiff William Pasley, an infant, and to Anna Pasley, individually, the total sum of $15,000 on account of the injuries and damages sustained by reason of the accident for which their action was still pending against the Kearns Coal Corporation (Ex. H, R. 412).

The *Pasley* action was first tried in March, 1935. Verdicts were rendered in favor of the plaintiffs which were set aside by the Trial Judge. Upon that first trial, however, the defendant Kearns Coal Corporation moved for a dismissal of the complaint and for the direction of a verdict in its favor. This motion was denied by the Trial Justice on the 22nd day of May, 1935 (Ex. R, R. 421-422).

Defendant Kearns Coal Corporation thereupon appealed from that part of the order of Justice CHURCH which denied its motions for the dismissal of the complaint and for the direction of a verdict in its favor. This appeal was argued by counsel for the defendant Kearns Coal Corporation urging that it was entitled to a dismissal of the complaint and the direction of a verdict in its favor. The Appellate Division, First Judicial Department, on January 22, 1937, unanimously ordered that the order of Justice LLOYD

CHURCH so far as appealed from be affirmed, and held in effect that a question of fact was presented for the jury (Ex. Q, f. 1258, reported 249 App. Div. 806).

Finally, the *Pasley* action was again tried, from May 3 to May 7, 1937. A verdict was rendered therein for the plaintiff William Pasley, an infant, for the sum of $30,000 and for the plaintiff Anna Pasley for the sum of $6,600, as evidenced by the final judgment entered on May 12, 1937 (Ex. 5, R. 339).

This judgment adjudicated and determined that at the time of the occurrence of the accident in the underlying action the motor vehicle of the Newton Contracting Company, Inc., was operated and controlled by the Kearns Coal Corporation, its agents, servants or employees.

The Kearns Coal Corporation and the Travelers Insurance Company, more than three years after the *Pasley* action was started, entered into an agreement, on July 6, 1937, under which the insurance company advanced $15,000 to Kearns, its named assured. The receipt of this sum was acknowledged by the Kearns Coal Corporation for the sole purpose of enabling it to settle and satisfy the judgment of May 12th, 1937, which had been rendered in favor of the Pasleys against the Kearns Coal Corporation (Ex. 18, R. 362-366). The money so paid by the Travelers Insurance Company to the Kearns Coal Corporation was used in settlement and satisfaction of the Pasley judgment. A satisfaction of the judgment was duly filed on July 13, 1937, and the *Pasley* action was closed on the records of the Supreme Court, County of Bronx. For the amount so paid in satisfaction of the said judgment this action was brought.

POINT I

No principle is involved or issue presented which this Court should review or pass upon.

Whether the petitioner in this action, a retail coal dealer doing business in the County of Bronx, City and State of New York, has made out any right to claim coverage under the policy of insurance issued by the defendant on the automobile of its assured, the Newton Contracting Company, is not a question of great public concern.

According to the petitioner, a review by this Court is requested herein to determine whether on the complicated facts of this case and the voluminous record herein, petitioner has established a right to recover against the respondent (Petition, p. 11).

This Court will not grant a writ of certiorari to review evidence and discuss specific facts,[1] nor was discretionary jurisdiction conferred upon the Supreme Court merely to settle matters of private interest,[2] or to give the party defeated in the Court below another hearing.[3]

Furthermore on the merits herein, certiorari must be denied for the reason that the Circuit Court of Appeals for the Second Circuit achieved a correct result in this action.

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1 *United States* v. *Johnston*, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925; *New York Central & H. R. R. Co.* v. *Kinney*, 260 U. S. 340, 346, 43 S. Ct. 122, 67 L. Ed. 294.

2 *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 17 S. Ct. 665, 41 L. Ed. 1095.

3 *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; 43 S. Ct. 531, 67 L. Ed. 922.

POINT II

According to plaintiff's contentions and the conceded evidence, the Kearns Coal Corporation was not an "additional assured" under the defendant's policy.

The plaintiff, not being named in the defendant's policy, must first show that it was an "additional assured" within the "omnibus clause" of the defendant's policy before it can bring any action thereon. This clause (Section II, (1)) reads:

> "The unqualified word 'Assured' includes not only the Named Assured, but any other person or organization while using any such automobile, including also any other person or organization responsible for the use thereof, provided the disclosed and actual use of such automobile is 'Pleasure and Business,' or 'Commercial,' each as defined herein, and further provided that such use is with the permission of the Named Assured. * * *"

By Item 10 (b) of "Declarations," "the term 'Commercial' when used is defined as the transportation or delivery and the loading and unloading of goods or merchandise in direct connection with the Assured's occupation as expressed in Item 3." And Item 3 states: "The Assured is (a) (1) Paving Contractor (2) Mfg. Paving Blocks." (See defendant's policy, Plaintiff's Exhibit 1, R. 326.)

It is conceded that the truck in question was being used on the day of the accident, not in connection with the business of a paving contractor or manufacturer of paving blocks, but in the delivery of coal sold by plaintiff.

Thus, according to the unequivocal definition, the use was not "Commercial" within the special meaning of the policy and hence plaintiff does not fall within the definition of an "additional assured" thereof.

The purpose and scope of the extended omnibus clause (Section II, (1)) is to afford coverage under the policy where one, other than the owner, is "using" or is "responsible for the use" of the car belonging to the owner. By judicial definition the coverage afforded thereunder is aimed "to protect the public against *operation of the car by others than the owners* * * *."

Brustein v. *New Amsterdam Casualty Co.*, 255 N. Y. 137, 142;

Bakker v. *Aetna Life Ins. Co.*, 264 N. Y. 150, 151, 152;

Lavine v. *Indemnity Ins. Co.*, 260 N. Y. 399, 407.

But if the plaintiff's claims are to control, namely, that the truck at the time of the accident was being used and operated by Newton Contracting Company, and not the Kearns Coal Corporation, then plaintiff has argued itself outside of the "omnibus clause" and consequently out of the policy sued upon.

On the other hand, if plaintiff were to assume the converse position, that it did have control of the truck, then recovery under the policy must still be denied.

Section IV (b) of the defendant's policy contained the further exclusion of liability *"under any of the above agreements while any disclosed automobile is rented to others."*

Control of the truck in the Kearns Coal Corporation, in addition to the admitted fact that plaintiff paid the sum of $30.00 a day (complaint, paragraph XI, R. 6) for the use thereof, would clearly constitute a "renting." This was so charged by Judge BURKE in the present action, to which counsel for plaintiff did not except, nor request the Court to charge otherwise (ff. 929, 931). The petitioner is then guilty of a violation of the "renting" provision, in which event, recovery under the policy is excluded.

Furthermore, should plaintiff take the position that it did have control of the truck it would necessarily follow that its contention that answers were given on the examination before trial by Mr. Kearns under a "misunderstanding of the law," as to control would be without merit.

This Court will also note that Section II (1) is further expressly limited by Section V, Condition "D" excluding "any other assured" where it has other "valid and collectible insurance against a loss also covered by this policy."

It is conceded that the Kearns Coal Corporation had a policy of insurance with the Travelers Insurance Company, which was issued prior to the defendant's policy, and in which the Kearns Coal Corporation was "a named assured" (see Defendant's Exhibit I, p. 413). For all of these reasons, the plaintiff failed to show that it came within the definition of an additional assured in the policy of the respondent.

POINT III

The Circuit Court of Appeals and the District Judge properly applied the New York law necessitating a showing of prejudice before an estoppel could arise against the defendant.

The District Judge in the present action charged the jury:

> "Before the jury may find that the defendant is estopped from asserting Section IV, which excludes any liability while the disclosed automobile is rented to others, they must first find that the plaintiff suffered actual prejudice as a result of the defendant's conduct" (f. 953).

This ruling was reaffirmed by the Circuit Court of Appeals, which specifically cited the principle of *Lavine* v. *Indemnity Insurance Co., of North America* (260 N. Y. 399, 183 N. E. 897, reversing 234 App. Div. 906, 254 N. Y. S. 1000, 142 Misc. 422, 254 N. Y. S. 804), as controlling. In this case, according to the facts as found by the Trial Judge sitting without a jury, the defendant for a period of months construed the policy to cover the liability in question. It received notice of the accident from the assured shortly after the accident happened. It investigated the accident, obtained affidavits from parties, and learned of the facts constituting a defense to the action. Further, the defendant without reservation or qualification assumed the defense of the action by getting an extension of time to answer (see 142 Misc. 422, 426). The Court of Appeals reversed the judgment in favor of the plaintiff and held specifically:

> "We are unable to agree with the conclusion reached by the Trial Term that the defendant by its conduct had waived the defense now insisted upon and estopped itself from urging such defense. The defendant's conduct did not in any way prejudice the plaintiff (*Weatherwax* v. *Royal Indemnity*, 250 N. Y. 281; *Gerka* v. *Fidelity and Casualty Co.*, 251 N. Y. 51.)"

The *Lavine* case illustrates the universal rule which requires a showing of prejudice before an equitable estoppel can arise.[4]

The New York Court of Appeals decided the *Lavine* case at a time subsequent to all of the cases cited by petitioner. It constitutes the latest and most authoritative ruling by the New York Court of Appeals, on the question of estoppel. The decision reveals (p. 402) that substantially all of the arguments and cases now cited by petitioner were expressly urged upon the Court's attention in the *Lavine* case, and, notwithstanding, the Court held that a showing of prejudice was necessary. It is respectfully submitted that the general rule as applied in the *Lavine* case should be followed and certiorari be denied here.

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[4] *Knauss, Inc.* v. *Indemnity Ins. Co.*, 270 N. Y. 211, 216, 200 N. E. 791; *Draper* v. *Oswego County Fire Relief Ass'n*, 190 N. Y. 12, 16, 82 N. W. 755; *Baker* v. *Union Mutual Life Ins. Co., of Maine*, 43 N. Y. 284; *Rhodes* v. *Ocean Accident & Guarantee Corp., Ltd.*, 239 App. Div. 92, 95, 266 N. Y. S. 92, affirmed 264 N. Y. 437; 191 N. E. 502; *Glen Falls Portland Cement Co.*, 162 N. Y. 399, 405, 56 N. E. 897; *Kitsap County Transport Co.* v. *Pacific Coast Cas. Co.*, 67 Wash. 297, 121 P. 457; *Makiesky* v. *National Guardian Life Ins. Co.*, 174 Minn. 554; 219 N. W. 864; *Vance, Insurance* (1930), p. 518.

POINT IV

Petitioner has failed to show facts sufficient to entitle it to claim an estoppel.

Having established that petitioner was not an "additional assured" under the policy issued by the respondent (Point II, *supra*), it must necessarily follow that petitioner is not one who is entitled to any standing in Court to assert an estoppel against the Fidelity Company. Since the petitioner does not come within the policy as a named assured, nor as an "additional assured," the Kearns Coal Corporation was consequently a stranger to the policy issued by the defendant. A stranger may not assert an estoppel against one who owed him no pre-existing duty to act or not to act in any prescribed manner.[5]

Moreover, the petitioner has not contended at any time during the present litigation that it was in ignorance of the true facts which here constitute a defense to plaintiff's action on defendant's policy. John J. Kearns, the president of the Kearns Coal Corporation, was also the secretary of the Newton Contracting Company (ff. 562, 579, 599-601). The petitioner had the fullest knowledge concerning the use and operation of the truck at the time of the accident (ff. 302, 757; Defendant's Exhibits K and 4, pp. 415, 417). The plaintiff was expressly and promptly informed that defendant's policy did not cover the Kearns Coal Corporation. The party petitioning for estoppel must present its claim in entire good faith. But, when its officers knew all of the facts, the petitioner cannot honestly claim

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[5] *Deery* v. *Cray*, 72 U. S. 795, 803; *Empire Mfg. Co.* v. *Moers*, 27 App. Div. 464, 467; *Averill* v. *Wilson*, 4 Barb. 180, 190; *Makiesky* v. *National Guardian Life Ins. Co.*, 174 Minn. 554, 219 N. W. 864.

that the insurer's representations misled it. Consequently it may not assert an estoppel.[6]

The respondent unequivocally advised petitioner that it was not covered by the policy issued to the Newton Contracting Company. It twice returned the summons and complaint to Kearns with the explicit statement that petitioner was not covered (Plaintiff's Exhibits 23, 24, 26, pp. 375-382). Upon the failure of the Travelers Insurance Company to defend, a default was imminent (f. 1147). Not only would this have constituted irreparable damage to plaintiff, but such default, with the admission of liability implicit therein, would have embarrassed and hampered the proper defense of the Newton Contracting Company, the owner of the truck. Under these unusual circumstances, the fact that the defendant yielded after the Travelers Insurance Company had three times refused to accept the summons which the petitioner had forwarded to it, cannot be construed as an admission or representation of liability by the defendant or the "free" adoption of a contract.[7]

The petitioner wholly failed to show that it was prejudiced by the appearance of the defendant in its behalf, prior to the time of disclaimer. There was no question of fact which properly could have been submitted to a jury to support any finding of prejudice.

The only prejudice claimed by the plaintiff in respect to the *Pasley* action was the alleged improper handling of the examination before trial of the Kearns Coal Corporation

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[6] *Vance Insurance* (1930), 518-524; *Makiesky* v. *National Life Ins. Co.*, 174 Minn. 554; 219 N. W. 864.

[7] *Mason-Henry Press* v. *Aetna Life Ins. Co.*, 211 N. Y. 489, 105 N. E. 826; *Joseph Gordon, Inc.* v. *Massachusetts Bonding and Ins. Co.*, 229 N. Y. 424, 128 N. E. 204; *Fidelity and Casualty Co. of New York* v. *Stewart Dry Goods Co.*, 208 Ky. 429, 271 S. W. 444.

by John J. Kearns, its president. The motion for an examination before trial had been opposed by Vincent F. O'Rourke, one of the designated attorneys, and his filed affidavit in opposition thereto is part of Defendant's Exhibit F (R. 402). The examination proceeded on direction of Mr. Justice WASSERVOGEL of the Supreme Court, who decided that the plaintiffs were entitled to a pre-trial examination as to Items 1 and 2 of the notice which related to the question of operation and control of the truck at the time of the accident (ff. 504-505, 1195, 1217). The answer prepared by Mr. O'Rourke denied operation and control on the part of the Kearns Coal Corporation (ff. 457, 989, 990, 1003, 1004, R. 335).

Mr. Kearns was not called to testify to any questions of law. If the direct questions as to supervision and control asked of him, improperly included conclusions of law as petitioner contends, the answers thereto would have been incompetent. This being so, regardless of what answers Mr. Kearns made on the examination before trial, the New York law expressly and explicitly states that such answers must be excluded *at the time of the trial* and not upon the examination itself.

> *New York Rules of Civil Practice,* Rule 129;
> *New York Civil Practice Act,* Section 305.

These two sections have been judicially construed to mean that any objections to incompetent questions upon an examination before trial *must only* be made upon the trial and not upon the examination.

> *Guenther* v. *Ridgway Co.,* 159 App. Div. 74, 77, 143, N. Y. S. 961;
> *Brown* v. *Bedell,* 232 App. Div. 158, 249 N. Y. S. 277.

With the right to object at the trial to whatever incompetent questions were asked of Mr. Kearns upon the pre-trial examination, the petitioner cannot rightfully claim that its position was "adversely affected" by the conduct of the attorney, Mr. O'Rourke, upon the examination before trial. If the attorney, who was later designated by the Travelers Insurance Company to act for the petitioner, failed to object to such questions upon the second *Pasley* trial, then the prejudice lies in his omission. If the trial justice during that trial improperly allowed any incompetent questions then the petitioner's remedy was on appeal.

If any error was committed by the Trial Court in that action in the New York Supreme Court, it cannot now be attacked collaterally in this honorable Court. It is well established under the New York law that a failure of the Trial Court to rule on incompetent questions at the trial on objections and exceptions then taken, even for the first time, constitutes reversible error.

> *Bambauer* v. *Schleider, et al.*, 176 App. Div., 562 at 564-565.

An objection to a question calling for the conclusions of the witness would be an objection not to *form*, but to the *competency* of a lay witness to express an opinion and therefore such objection was properly reserved for the trial.

> *Merritt* v. *Briggs*, 57 N. Y. 651.

In any event, there is no foundation in this record to support the arguments of counsel for petitioner, that Mr. Kearns misunderstood the meaning of the questions as to "supervision and control." The present trial took place shortly less than six years since the attorneys for the defendant withdrew as counsel for the Kearns Coal Corpora-

tion. During this time it had its own attorneys to advise it on what actually constituted control. Yet Mr. Kearns on this trial, in answer to a question asked by Mr. Skidmore as to what he meant by an answer given upon the examination that George Williams was driving the automobile truck under his supervision answered:

> "I understood by that question that Mr. Weltz was asking me *whether or not the truck worked for me that day, and whether it was under my control for the nine days—for the nine hours which constituted a days' work at that time*" (ff. 583, 593).

Mr. Kearns there reiterated on this trial his statement that the truck was under his control. His following answer that he understood by control "where Williams was to take and deliver his load of coal," does not reveal any gross misunderstanding of what is legally meant by control but rather is consistent therewith (ff. 594, 595).

On cross examination Mr. Kearns testified that he was a witness at the second Pasley trial, and that he probably did tell the jury in that case just what he meant by the answers he made on the examination before trial (f. 596). This was substantially the view taken by the justice who presided on that trial when he said: "If the conclusion is not right, the witness (Mr. Kearns) is still available to elicit the facts, if the facts differ" (f. 557). This same witness, John J. Kearns, on the first Pasley trial testified that he understood every answer that he gave upon the pre-trial examination. (See record on appeal, p 302, f. 906, in the case of *Pasley, et al.* v. *Kearns Coal Corporation,* 249 App. Div. 806.)

No motion was ever made by petitioner during the 2½ years which elapsed between defendant's disclaimer of

liability and the second trial in the *Pasley* action, to correct any of the answers given by Mr. Kearns. Nor was leave ever requested to have the examination before trial re-opened for the purpose of taking additional testimony.

It cannot be said that upon the examination before trial Mr. O'Rourke should have advised the Kearns Coal Corporation that it did not have control of the truck. If Mr. O'Rourke had done this, he would then have been subject to the criticism that he was laying a foundation for a disclaimer under the defendant's policy in respect to the provisions of the omnibus clause. If Mr. Kearns had testified upon that examination that he was not in control then, as already demonstrated in Point II, *supra*, the Kearns Coal Corporation would not have been "using" or "responsible for the use" of the truck. In consequence it would definitely have been excluded as an additional assured under the defendant's policy. This, too, would have have necessitated a disclaimer of liability by the defendant.

Petitioner's contention that as a matter of law the Kearns Coal Corporation did not have control of the truck is incorrect and Mr. O'Rourke as an attorney could not have ethically given any such advice. The order of the Appellate Division, First Judicial Department which unanimously affirmed the refusal of the Trial Court to dismiss the Pasley's complaint as to the Kearns Coal Corporation completely vindicated Mr. O'Rourke's action in not advising petitioner that it was not in control (see 249 App. Div. 406). The petitioner here cannot possibly contend that as a matter of law Kearns was not in control, when the New York Appellate Division has held squarely that the Kearns Coal Corporation, could properly be found under the facts in this case to have been in control.

Alfred J. Pagano, office manager and chief clerk of the Kearns Coal Corporation, testified that when the coal company's business was more than their own trucks could handle "*we had to hire outside trucks. In most cases it was this particular truck owned by the Newton Contracting Company*" (f. 134).

The truck came to its place of business at seven o'clock in the morning. "Mr. Williams was told what to load, that is, in sizes of coal, and the man—and he went down the yard and he loaded them, pulled up to the scale, it was weighed, tickets were made out, sent out for delivery" (f. 140). George Williams' duties were more than that of a chauffeur. When he went out on the truck with the workmen, it was Williams who was charged with personal responsibility. He made the delivery in accordance with his orders. He collected the money due for the coal and gave a receipt therefor when the ticket was marked for C. O. D. delivery (ff. 253-256, 302, 1021, Exs. 6 and 7).

When Williams received the ticket for the last load at about four or a little after in the afternoon of December 31st, Pagano told him "to come to work the next morning at seven o'clock." After making this last delivery of coal, Williams started for the garage. Even though the work sometimes required a quarter or a half hour overtime, it was customary only to charge for nine hours (ff. 151, 289, 311).

Signs about three feet high and six feet long reading "Kearns Coal Corporation, Bronx, N. Y." were on each side of the truck. *Prima facie*, the Kearns Coal Corporation was responsible for the damages caused, on this admitted fact.[8] Directly after the accident happened, Wil-

[8] *Baldwin* v. *Abraham*, 57 App. Div. 67; affd. 171 N. Y. 677; *Stapleton* v. *Butensky*, 188 App. Div. 237; *Horowitz* v. *Daily Mirror Inc.*, 144 Misc. 99, affd. 237 App. Div. 876.

liams notified Mr. Pagano first by telephone. And, the next morning Williams went back to Mr. Pagano with the same truck and worked again for the Kearns Coal Corporation (ff. 302-304, 1247) as he was directed prior to the accident by them (f. 151).

It cannot be argued seriously by petitioner that the status of Williams' employment changed on the stroke of five o'clock, especially on the evidence herein that there was ice and snow on the streets which made the pavement slippery and much delayed the progress of the truck (ff. 314, 1251).

Under all of the New York authorities where one has an accident while on his way home from the place where he had made his last call or last delivery for the day in the business of another, it has been held that at the time of the accident such employee was still engaged in the performance of the duties for which he was employed.

Burdo v. *Metropolitan Life Insurance Co.*, 254 App. Div. 26, 28; affd. 279 N. Y. 648;
Ulm v. *Western Union Telegraph Co.*, 258 App. Div. 776; affd. 282 N. Y. 645;
Matter of Katz v. *Kadans & Co.*, 232 N. Y. 420.

These particular facts distinguish the case at bar from the cases cited by petitioner on pages 21 to 23 of his brief. In this case we have the affirmative testimony of Mr. Kearns that as part of the agreement or contract of hiring, and in consideration of the sum of $30 per day, the Newton Contracting Company was to surrender control of the truck to the Kearns Coal Corporation (ff. 458, 470, 475, 519, 520, 521, 531-533). Counsel for petitioner are careful not to allege that such questions asked on the pre-trial examina-

tion were improper. (See p. 7 of petitioner's brief.) Nor can it be denied that such questions were proper since they concerned the terms of an oral contract of hiring and were clearly a question of fact, which was determined adversely to the Kearns Coal Corporation in the *Pasley* action. There was therefore in the case at bar clearly a new relationship between Williams and Kearns Coal Corporation, since, by agreement, command had been surrendered to the petitioner.

It is a complete answer to the charge of a failure to object to questions on the examination before trial that appropriate objections were actually made upon the second *Pasley* trial as shown by the record. The learned Trial Court on that *Pasley* trial did pass upon the competency and relevancy of all of the questions which counsel in this action has sought to prove to be prejudicial. Some of the objections were sustained, and others were overruled (ff. 513, 520-533).

Another complete answer to plaintiff's contention of prejudice is that the rule excluding opinion evidence is subject to exceptions. A common exception thereto is the rule that a lay witness may state an opinion or a conclusion where the witness has knowledge of the facts upon which the conclusion is derived. Merely because a conclusion of fact may also have a legal significance would not necessarily make the opinion incompetent.

> *Sweet* v. *Tuttle*, 14 N. Y. 465, 471;
> *De Wolf* v. *Williams*, 69 N. Y. 621, 622;
> *Knapp* v. *Smith*, 27 N. Y. 277, 281, 282.

Mr. Kearns was examined before trial in the *Pasley* action in the presence of Ross Brown, president of the Newton Contracting Company, and George Williams, the

driver of the truck at the time of the accident (ff. 573-574). In his double capacity as president of the Kearns Coal Corporation (ff. 578-579) and as secretary of the Newton Contracting Company (ff. 620-621), Mr. Kearns was certainly qualified to testify as to which of the two companies was in control of the motor truck at the time of the accident.

Also, Mr. Kearns testified that he talked over and discussed all of the facts in the *Pasley* case with Ross Brown about the 3rd of January, 1934 (f. 600). The Court's order provided for the examination to be held on March 9, 1934. Kearns knew prior to the examination before trial that "the idea of the examination" was to see "who was in supervision of the truck when the accident happened." He says that to the best of his knowledge and belief he told the truth on that examination. He swore before a notary public that the answers given by him were true. He read his deposition over very carefully and knew that it was to be used on the *Pasley* trial (ff. 569, 570, 596, 600, 611-613). For all of these reasons the Kearns Coal Corporation was not prejudiced in the *Palsey* action. Its president on being examined before trial told the whole truth.

Petitioner, nevertheless, states that its main contention is not that Mr. O'Rourke, was negligent, but that he deliberately failed to protect the Kearns Coal Corporation. It is charged against this member of the bar that he was willing to lay a foundation for a subsequent disclaimer by his client, the defendant in this action. This charge is baseless. In making it, petitioner's counsel disregards the evidence on this record that both Mr. Kearns and Mr. Brown reaffirmed on the trial the truth of their testimony on the pre-trial examination (ff. 596, 693). The fact is also referred to in this record that Mr. Brown testified in the Pasley trial that "they timed the hiring from the

time that the truck got to Kearns to the time it returned to the garage" (f. 694).

Petitioner argues that the admissions which Mr. Kearns made on his examination before trial were a deciding factor in persuading the Trial Judge on the second trial of the *Pasley* action to deny the motions to dismiss the complaint. How can the petitioner fairly argue what the record in the underlying case would disclose when, by plaintiff's objections, that record when offered by defendant, both in parts and as a whole, was excluded by the District Court in the case at bar? We do not know what was in the mind of the Judge but we do know that the printed record of the second Pasley trial does not disclose any of the prejudice claimed by petitioner. A party may not profit on an appeal by an erroneous ruling which he himself induced the Court below to render.

> *Roche* v. *Nason*, 185 N. Y. 128; BARTLETT, *J.*, at page 135.

Petitioner's counsel in their brief erroneously state at pages 29-30 that the issuance by defendant of a certificate of insurance to Stephens Fuel Co., another retail coal dealer, indicated a knowledge that the trucks of the Newton Contracting Company were to be used to carry coal. No inference of any such purpose can be drawn from the issuance of a certificate of insurance. Such a paper is merely a statement that an insured, such as the Newton Contracting Company, has protected itself with automobile liability insurance. No charge is made for furnishing this information, and the so-called certificate of insurance extends no coverage whatever to anyone. It has no more effect than if the insurance company wrote a letter advising

the inquirer that the Newton Contracting Company or any other company had insured its trucks.

In this case the Newton Contracting Company, which was engaged in business as a paving contractor may have had a contract to pave the coal yard, the ramps or driveways of the Stephens Fuel Co. The certificate of insurance was informative only as to the contractor's automobile insurance coverage. That is what the defendant, as underwriters, would assume from such an inquiry. There is no evidence in the case, nor can it be assumed from such a certificate, that coal was carried by the Newton Contracting Co., for the Stephens Fuel Co.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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